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No. 07-61

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IN THE
Supreme Court of the United States

LINWOOD CHARLES MATHIAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The Disagreement Among The Circuits Warrants This Court's Review. 2

II. Walkaway Escapes Are Not Categorically Violent Felonies. 7

III. It Is Not Apparent That This Case Should Be Held For *Begay* v. *United States* 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page(s)

Begay v. *United States*, No. 06-11543, *cert granted* Sept. 25, 2007 9

Buford v. *United States*, 532 U.S. 59 (2001) 5

James v. *United States*, 127 S. Ct. 1586 (2007) 7

Maynard v. *State*, 652 P.2d 489 (Alaska Ct. App. 1982) 3

Orth v. *United States*, 252 F. 566 (4th Cir. 1918) 3

State v. *Burton*, 2006 WL 1134215 (Del. Super. Ct. 2006) 3

Stinson v. *United States*, 508 U.S. 36 (1993) 5

Taylor v. *United States*, 495 U.S. 575 (1990) 7

Thomas v. *Commonwealth*, 563 S.E.2d 406 (Va. Ct. App. 2002) 4

Toledo-Flores v. *United States*, 547 U.S. 1054 (2006) 5

United States v. *Avalos*, 2007 WL 3076918 (10th Cir. Oct. 23, 2007) 4

United States v. *Bailey*, 444 U.S. 394 (1980) 3

United States v. *Chambers*, 473 F.3d 724 (7th Cir. 2007) 5, 6, 7, 8

United States v. *Collier*, 493 F.3d 731 (6th Cir. 2007) 2

United States v. *Harris*, 165 F.3d 1062 (6th Cir. 1999) 2

United States v. *Ingram*, 2007 WL 2492463 (8th Cir. Sept. 6, 2007) 4

United States v. *Lancaster*, 2007 WL 2457448
(6th Cir. Aug. 31, 2007) 3, 4

United States v. *McNack*, 2007 WL 2007[illegible]3
(10th Cir. July 12, 2007) (unpublished) 4

United States v. *Moudy*, 132 F.3d 618
(10th Cir. 1994) 7

United States v. *Parks*, 2007 WL 2874006
(8th Cir. Oct. 4, 2007) 4

United States v. *Piccolo*, 441 F.3d 1084
(9th Cir. 2006) 1, 5

United States v. *Pratt*, 496 F.3d 124
(1st Cir. 2007) 4, 5

United States v. *Richards*, 456 F.3d 260
(1st Cir. 2006) 5

United States v. *Smithers*, 27 F.3d 142
(5th Cir. 1994) 3

United States v. *Springfield*, 196 F.3d 1180
(10th Cir. 1999) 6

United States v. *Summers*, 238 Fed. Appx. 552
(11th Cir. July 12, 2007) (unpublished) 4

United States v. *Taylor*, 489 F.3d 1112
(11th Cir. 2007) 6

United States v. *Thomas*, 333 F.3d 280
(D.C. Cir. 2003) 9

United States v. *Vowiell*, 869 F.2d 1264
(9th Cir. 1989) 3

STATUTES

18 U.S.C. § 924 ..... 1, 2

Va. Code Ann. § 18.2-479 4

OTHER

Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270 (2005) 8

Virginia Dep't of Corrs., Statistical Summary FY 2005, http://www.vadoc.virginia.gov/about/facts/research/new-statsum/fy05statsummary.pdf 8

Virginia Parole Board Monthly Decisions, http://www.vadoc.virginia.gov/resources/vpb/decisions/default.shtm 8

REPLY BRIEF FOR PETITIONER

The court of appeals held that Petitioner's conviction for escape "other than by force or violence" based on his failure to return from a work release program is a violent felony for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Respondent does not deny that there is a circuit split over whether a conviction for an "escape" crime that punishes a walkaway escape or a failure to return to a halfway house is categorically a violent felony under the ACCA. Indeed, Respondent acknowledges that after the petition was filed in this case the Sixth Circuit issued two decisions holding that walkaway escapes are *not* always violent felonies under the ACCA. Br. in Op. 6-7.

The Fourth Circuit's opinion in this case also conflicts with the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (2006), which holds that a conviction under a statute that punishes walkaway escapes is not categorically a crime of violence for purposes of the career offender provisions of the federal Sentencing Guidelines. *Piccolo* involved the definition of "crime of violence" under the Sentencing Guidelines, but that definition is materially identical to the definition of "violent felony" in the ACCA and the courts of appeals uniformly construe the two terms to have the same meaning. As Respondent concedes, *Piccolo* indicates "that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of ACCA." Br. in Op. 7.

In addition to the decisions of the Sixth and Ninth Circuits, a growing chorus of judges from the Seventh, Tenth, Eleventh, and District of Columbia Circuits have disagreed with the Fourth Circuit's approach in this case. *See* Pet. 12-16. Review by this Court is warranted to resolve the widening dispute on this important and recurring issue.

I. The Disagreement Among The Circuits Warrants This Court's Review.

1. Since the petition in this case was filed, the Sixth Circuit has issued two opinions analyzing whether walkaway escapes are violent felonies under the ACCA. In *United States* v. *Collier*, the court held that a conviction under a Michigan statute was *not* a violent felony. 493 F.3d 731 (6th Cir. 2007). The *Collier* defendant's "escape" involved "simply stepping off a public Greyhound bus – where he was unaccompanied by any correctional officials – and failing to report to the facility to which he was being transferred." *Id.* at 734-35. The court stated, "We doubt that a statute covering this 'failure to report' variety of escape necessarily 'involves conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 735, quoting 18 U.S.C. § 924(e)(2)(B).

The court distinguished a prior case involving a Tennessee escape statute because that statute applied to prisoners "confined in a county workhouse or jail or city jail or municipal detention facility," *i.e.*, a "jailbreak." *Id.* at 734, distinguishing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999). The court observed that "the circuits are split on whether the distinction between a jailbreak and a 'walk away' is meaningful." *Id.* at 735 (footnote and citations omitted). As an additional reason for distinguishing *Harris*, the court noted that Tennessee courts have "consistently interpreted escape to be a 'continuing offense' that lasts until the defendant is re-apprehended, but Michigan courts have consistently held that escape is complete once the defendant leaves custody without having been discharged." *Id.* at 736. The court concluded that "it is inappropriate to speculate about" whether the defendant's recapture might involve violence "because that conduct simply is not part of the offense." *Id.*

Six weeks after *Collier*, another Sixth Circuit panel decided *United States* v. *Lancaster*, 2007 WL 2457448 (6th Cir. Aug. 31, 2007). The panel held that a Kentucky conviction for second-degree escape *is* categorically a violent felony under the ACCA, even though second-degree escape does not require the use or threat of force against another person. *Id.* at *2, *7.

The *Lancaster* court distinguished *Collier* on the ground that the "majority rule among the various jurisdictions is that the crime of escape is considered a continuing offense." *Id.* at *6 (citing 14 states and this Court holding escape is a continuing offense and 6 states holding that it is not).[1] Although Kentucky has not determined whether escape is a continuing offense, the court "anticipate[d] how the state supreme court would likely construe its state law," and held that escape is a continuing offense in Kentucky. *Id.* at *5 n.3, *7. On that ground, the court held that Kentucky second-degree escape categorically involves "conduct that presents a

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[1] At least two of the states identified in *Lancaster* as treating escape as a continuing offense have authority pointing in the other direction. *E.g.*, *Maynard* v. *State*, 652 P.2d 489, 492 (Alaska Ct. App. 1982) ("The offense of escape is complete when a person once in lawful custody, voluntarily removes himself from the custody without lawful authority."); *State* v. *Burton*, 2006 WL 1134215 (Del. Super. Ct. 2006) ("[A]ctions taken after the break or departure from custody are not relevant to the charge of escape-there generally is no 'continuous act' of escape."). In addition, federal cases have distinguished this Court's decision in *United States* v. *Bailey*, 444 U.S. 394 (1980), and held that escape is not continuing in some circumstances. *See United States* v. *Vowiell*, 869 F.2d 1264, 1268 (9th Cir. 1989), quoting *Orth* v. *United States*, 252 F. 566, 568 (4th Cir. 1918) ("When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete."); *see also United States* v. *Smithers*, 27 F.3d 142, 144 (5th Cir. 1994).

seriou[illegible]tential risk of physical injury to another." *Id.* at *7.[2]

The *Collier* and *Lancaster* decisions illustrate that the question presented continues to generate uncertainty and disagreement in the courts of appeals, and would benefit from this Court's review.[3] The Sixth Circuit's decisions hold that in some circumstances a conviction for escape under a statute that covers walkaways is not categorically a "violent felony." The law of the Sixth Circuit thus conflicts with the Fourth Circuit's decision in this case that "any escape, even an escape by stealth, inherently presents the serious potential risk of physical injury to another." Pet. App. 7a (internal quotation marks omitted).

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[2] Although the Virginia courts do not appear to have ruled on whether a violation of Va. Code § 18.2-479 is "continuing," there is reason to think they would hold that it is not. When deciding whether a crime is "continuing" for venue purposes, Virginia courts require that all elements of the crime must have been committed in the jurisdiction for venue to be proper. *Thomas* v. *Commonwealth*, 563 S.E.2d 406, 409 (Va. Ct. App. 2002) (holding that venue was improper for "speeding to elude resulting in serious bodily injury" because serious bodily injury did not occur in the county where the crime was tried). A violation of Va. Code § 18.2-479 requires both "lawful confine[ment]" and "escape[]." Under Virginia's approach, these elements would occur in a single county, and thus escape would not be a "continuing" offense.

[3] The issue has arisen in multiple cases since the petition in this case was filed. *E.g.*, *United States* v. *Avalos*, 2007 WL 3076918 (10th Cir. Oct. 23, 2007); *United States* v. *Parks*, 2007 WL 2874006 (8th Cir. Oct. 4, 2007); *United States* v. *Ingram*, 2007 WL 2492463 (8th Cir. Sept. 6, 2007); *United States* v. *Pratt*, 496 F.3d 124, 130 (1st Cir. 2007); *United States* v. *McNack*, 2007 WL 2007583 (10th Cir. July 12, 2007) (unpublished); *United States* v. *Summers*, 238 Fed. Appx. 552 (11th Cir. July 12, 2007) (unpublished).

2. The Fourth Circuit's decision also conflicts with the Ninth Circuit in *United States* v. *Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006). *Piccolo* held that a conviction under the federal escape statute, which covers nonviolent walkaway escapes, was not a "crime of violence" for purposes of the Sentencing Guidelines. *Id.* at 1088-90. Respondent argues that there is not any conflict with *Piccolo*, because that case interpreted the Sentencing Guidelines rather than the ACCA. But Respondent does not deny that the courts of appeals uniformly construe the definitions of "violent felony" in the ACCA and "crime of violence" in the Sentencing Guidelines to be materially identical. *E.g.*, *United States* v. *Pratt*, 496 F.3d 124, 130 (1st Cir. 2007) ("We have also held that 'the definitions of "crime of violence" and "violent felony" are mirror images of each other and that, therefore, cases construing one such term should be considered instructive with respect to the scope of the other.'" quoting *United States* v. *Richards*, 456 F.3d 260, 263 n.2 (1st Cir. 2006)); *see also* Pet. 6 (citing additional cases). To the contrary, Respondent acknowledges that "*Piccolo*'s reasoning appears to signal that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of ACCA," and suggests no basis upon which the Ninth Circuit could distinguish the ACCA from the Sentencing Guidelines. Br. in Op. 7. Consequently, the Ninth Circuit's decision in *Piccolo* provides a basis for this Court's review.[4]

3. The circuit split in this case is augmented by a growing chorus of judges who disagree with the Fourth Circuit's approach. Pet. 12-16; *see also, e.g.*, *United States*

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[4] The Court has granted review in prior cases in which a split in authority involves the Sentencing Guidelines but extends beyond the Guidelines themselves. *E.g.*, *Toledo-Flores* v. *United States*, 547 U.S. 1054 (2006); *Buford* v. *United States*, 532 U.S. 59, 63 (2001); *Stinson* v. *United States*, 508 U.S. 36, 39-40 (1993).

v. *Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) (Posner, J.); *United States* v. *Springfield*, 196 F.3d 1180, 1186 (10th Cir. 1999) (McKay, J., concurring) (rejecting the conclusion that "escape is necessarily always a violent crime"); *United States* v. *Taylor*, 489 F.3d 1112 (11th Cir. 2007) (Hill, J., concurring) ("I wish to express my agreement with those who reject the rule that escape is categorically a violent felony.").

Contrary to Respondent's assertion, Petitioner did not "misquote" the opinion in *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007). Br. in Op. 8-9. In that case, Judge Posner's opinion for the court stated: "As an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often 'involves conduct that presents a serious potential risk of physical injury to another.'" 473 F.3d at 725. The court then reviewed decisions holding that escape is categorically a violent felony, and noted that each involved "failure to return to a halfway house – a type of failing to return that seems even less violence-prone than failing to show up at prison, because a violent prisoner would be less likely to be serving a part of his sentence in a halfway house – or a 'walkaway' escape, which does not involve breaking out of a building or wrestling free of guards." *Id.* at 726. The court then stated:

> We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.

Id. Judge Posner noted that the possibility of violence during recapture is "conjecture floating well free of any

facts." *Id.* at 727. To be sure, Judge Posner's opinion for the Seventh Circuit states that "it is an embarrassment to the law when judges base decisions of consequence on conjectures." *Id.* at 726. But the opinion also concludes that decisions in cases such as this *are* based on conjecture — including "conjecture floating well free of any facts." *Id.* at 727.

II. Walkaway Escapes Are Not Categorically Violent Felonies.

In arguing that all escapes are violent felonies, Respondent relies on two arguments that apply to "jailbreak" scenarios but not to walkaways or failures to return.

Under the "categorical approach" adopted by this Court in *Taylor* v. *United States*, a court generally will "look only to the fact of conviction and the statutory definition of the prior offense," as opposed to the particular facts underlying the crime. 495 U.S. 575, 600, 602 (1990) (footnote omitted). "[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007) (emphasis added).

Respondent asserts that escape poses a serious potential risk of physical injury because "every escape scenario is a powder keg." Br. in Op. 4-5, quoting *United States* v. *Moudy*, 132 F.3d 618, 620 (10th Cir. 1994). While this rationale makes sense as applied to a "jailbreak" scenario, it makes very little sense as applied to escapes by unsupervised individuals outside of prison. Such escapes, by their nature, are likely to involve a relatively low risk of confrontation with law enforcement officers. An individual who escapes in such circumstances is unlikely to have the "supercharged emotions" of an individual who engages in a jailbreak. *Id.*

Respondent suggests that the "ordinary" escape case involves a jailbreak rather than a walkaway. Br. in Op. 4. Common sense and empirical evidence indicate that the opposite is true. *First*, a walkaway escape has a greater chance of success and poses less risk of harm than a jailbreak. *Second*, as Judge Posner noted in *Chambers*, recent research shows that almost 90 percent of all escapes are walkaways. *Chambers*, 473 F.3d at 727 (citing Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 278 (2005)).[5]

Because walkaways and failures to return are more common than jailbreaks, they cannot be dismissed as outside the "ordinary case" of escape. These crimes do not present a serious potential risk of injury to another and accordingly are not violent felonies under the ACCA.

Respondent also asserts that "[i]ndividuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." Br. in Op. 6, quoting Pet. App. 9a. Again, the assertion may be true for jailbreak escapees, but there is no basis for assuming that a prisoner who has taken only the minimal risk necessary to fail to return from unsupervised release would run the risk of resisting rearrest. Moreover, as the D.C. Circuit has noted, this argument proves too much, because whenever a law enforcement officer is called upon

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[5] According to reported decisions of the Virginia Parole Board, parole was revoked for failure to report or absconding from supervision seventy-five times in 2005. *See* Virginia Parole Board Monthly Decisions, http://www.vadoc.virginia.gov/resources/vpb/decisions/default.shtm (tables reporting monthly decisions and decision codes). During that same period, there were only two escapes from secure facilities in Virginia. *See* Virginia Dep't of Corrs., Statistical Summary FY 2005, http://www.vadoc.virginia.gov/about/facts/research/new-statsum/fy05statsummary.pdf.

to arrest an individual, there is a possibility that the individual will resist and someone will be injured. *See United States* v. *Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003) ("While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of any lawbreaker.").

III. It Is Not Apparent That This Case Should Be Held For *Begay* v. *United States*.

Respondent suggests that the Court may wish to hold this case pending its decision in *Begay* v. *United States*, No. 06-11543, *cert granted* Sept. 25, 2007. Br. in Opp. 9. It is not apparent to Petitioner that there is any reason to hold this case for *Begay*.

Begay presents the question whether driving while intoxicated is a "violent felony" under the ACCA. The crux of the issue in *Begay* appears to be whether interpretive canons such as *ejusdem generis* and *noscitur a sociis* limit the ACCA's requirement of "a serious potential risk of physical injury to another" to offenses similar to "burglary, arson, or extortion," or whether the risk of physical injury in driving while intoxicated is sufficient even though the crime is not ordinarily considered "violent."

In this case, in contrast, the crux of the issue is whether "escape" crimes categorically involve a serious potential risk of physical injury to another, even if the escape consists of failing to return to a halfway house or walking away from an unsupervised work release. It is not apparent to Petitioner that the Court's resolution of the question presented in *Begay* will shed significant light on the question presented here. Nor will it resolve the conflict among the circuits or silence the chorus of judges who have disagreed with the majority rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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